STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2014
v	No. 312581 Kalamazoo Circuit Court
CHRISTOPHER LAMONT WALLACE, Defendant-Appellant.	LC No. 2011-001795-FC

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f) (personal injury). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 40 to 75 years' imprisonment. We affirm.

Defendant's conviction arose out of his sexual assault of an acquaintance. The acquaintance let defendant into her house, and defendant handed his crack pipe to her to use. As she turned towards her bed, defendant grabbed her, bound her, and sexually assaulted her. The trial court admitted other acts evidence under MRE 404(b) from another victim, who was also an acquaintance of defendant's. The other acts victim testified that defendant sexually assaulted her after the two smoked crack cocaine.

Defendant first argues that the other acts evidence was inadmissible under MRE 404(b). We disagree.

Under MRE 404(b)(1):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"Prior bad acts evidence is admissible if: (1) a party offers it to prove 'something other than a

character to conduct theory' as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as 'enforced by MRE 104(b)'; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, defendant in this case." *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001), quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Additionally, "the trial court may, upon request, provide a limiting instruction to the jury." *VanderVliet*, 444 Mich at 55.

Prior bad acts evidence is admissible to show a common plan or scheme. MRE 404(b)(1). "In a sexual assault prosecution, evidence of prior acts is admissible under MRE 404(b) if it 'tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent.'" *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996), quoting *People v Oliphant*, 399 Mich 472, 488; 250 NW2d 443 (1976). Here, exactly as in *Gibson*, "[t]he assault in each case involved a woman who defendant knew was a crack cocaine user." *Gibson*, 219 Mich App at 533. "In each case defendant took affirmative steps to be alone with the complainant." *Id.* "In each case defendant asserted not just the defense of consent, but consent in the context of an exchange of sex for drugs." *Id.* "This demonstrates that defendant had a plan for choosing his victim on the basis of knowledge that she was a crack user that would enable him to claim a sex-for-drugs swap should he be accused of the crime." *Id.* Therefore, the evidence in this case was offered for a proper purpose under MRE 404(b) to show a common plan or scheme. *Id.*

The evidence was also relevant under MRE 402. "The fact that defendant employed a similar method and defense in a prior case is probative of whether he employed the same means in anticipation of using the same defense if accused." *Gibson*, 219 Mich App at 533; see *People v Mardlin*, 487 Mich 609, 624; 790 NW2d 607 (2010) ("The defense theory in a case in part governs what evidence is logically relevant."). In addition, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice because the other acts evidence was highly probative of defendant's common plan or scheme of taking advantage of a scenario where it would be difficult for his victims to prove that they did not consent. MRE 403. Moreover, there is no evidence that the other acts were "given undue or preemptive weight by the jury," *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), or that the other acts injected "considerations extraneous to the merits of the lawsuit," *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Further, the "jury received an appropriate limiting instruction." *Gibson*, 219 Mich App at 534. "[A] limiting instruction . . . that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Thus, the trial court did not abuse its discretion in admitting the evidence. *People v Gipson*, 287 Mich App 261, 262; 787 NW2d 126 (2010).

Defendant next argues that the prosecutor undercut the requisite burden of proof by informing a juror during voir dire "[y]ou have to determine whether I've proven these elements and it has–it's only to do with the evidence you hear in court." We disagree with defendant's argument.

A prosecutor may not misstate the burden of proof, and may not mislead the jury into shifting the burden of proof to the defendant. See *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved of on other grounds *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Here, the prosecutor's statement informed the jury that the in-court evidence was what the jury needed to review in order to determine defendant's guilt. The statement was legally correct. See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Contrary to defendant's assertion, the statement cannot be construed as a limitation on the jury's right to find a reasonable doubt based on a lack of evidence. Moreover, the trial court instructed the jury that a reasonable doubt is an "honest doubt growing out of the evidence or lack of evidence" and that defendant was presumed to be innocent. "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Defendant further argues that trial counsel was ineffective for failing to object to the prosecutor's statement; however, because we have concluded that the statement was proper, we similarly conclude trial counsel's conduct was not ineffective on this ground. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Correspondingly, we also deny defendant's alternative request for a *Ginther*[1] hearing on these grounds.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).